

NOTICE OF INTENT

Office of the Governor Public Defender Board

Capital Defense Guidelines (LAC 22:XV.Chapter 9)

Editor's Note: This Notice of Intent is being repromulgated due to a submission error. The original Notice of Intent is printed on pages 2880-2892 of the December 20, 2009 *Louisiana Register*.

The Public Defender Board, a state agency within the Office of the Governor, proposes to adopt LAC 22:XV.Chapter 9, as authorized by R.S. 15:148. This proposed Rule is promulgated in accordance with the provisions of the Administrative Procedure Act, R.S. 49:950 et seq.

Act 307 of the 2007 Regular Session of the Louisiana Legislature directed the Public Defender Board to adopt rules creating mandatory: 1) statewide public defender standards and guidelines that require public defender services to be provided in a manner that is uniformly fair and consistent throughout the state; and 2) qualification standards for public defenders that ensure that the public defender services are provided by competent counsel. Said standards are to ensure that public defenders are qualified to handle specific case types which shall take into consideration the level of education and experience that is necessary to competently handle certain cases and case types, including capital cases. In compliance with the directives of Act 307, the Public Defender Board proposes to adopt these capital defense guidelines.

Title 22

CORRECTIONS, CRIMINAL JUSTICE AND LAW ENFORCEMENT

Part XV. Public Defender Board

Chapter 9. Capital Defense Guidelines

§901. Objective and Scope of Guidelines

A. Objective of the Guidelines and Performance Standards

1. The objective of these guidelines and associated performance standards is to create mandatory statewide guidelines and performance standards for the defense of capital cases as required by R.S. 15:148(B)(10) in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence in a manner that is uniformly fair and consistent throughout the state.

2. The guidelines are principally intended to focus on the structure of capital defense service delivery. The associated performance standards are principally intended to focus on the tasks involved in the delivery of capital defense services by attorneys, investigators, mitigation specialists and supervisors.

3. These guidelines are intended to adopt and apply the guidelines for capital defense set out by the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, its associated Commentary and the *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*. In these guidelines, the ABA guidelines have

been adapted and applied to meet the specific needs and legal requirements applicable in Louisiana while seeking to give effect to the intention and spirit of the ABA guidelines.

4. These guidelines and associated performance standards are intended to provide capital defenders and responsible agencies with specific guidance on the performance of their functions and to allow the state public defender and the Public Defender Board to more efficiently evaluate the delivery models and performance of the capital defense services provided throughout the state.

B. Scope of the Guidelines

1. These guidelines and associated performance standards apply from the moment the client is taken into custody and extend to all stages of every case in which the state may be entitled to seek the death penalty, including pre-indictment proceedings, the initial and ongoing investigation, pretrial proceedings, trial, motion for new trial, sentencing, the direct appeal, state and federal post-conviction review, clemency proceedings, and any connected litigation. The guidelines and performance standards also apply to any services rendered prior to the client being taken into custody, such as where counsel assists the client in surrendering.

2. Unless specifically mentioned, these guidelines shall apply only in the case of capital defendants who are eligible for public defender services. The word "defendant" is used broadly to describe the client at all stages of every case covered by these guidelines.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§903. Adoption and Implementation of Capital Representation Plans

A. Adoption of Capital Representation Plans

1. The state public defender shall adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these guidelines (the Louisiana Capital Representation Plan).

2. Each district public defender (or regional director where a service region has been established) shall adopt and implement a plan formalizing the means by which high quality legal representation in death penalty cases is to be provided in accordance with these guidelines and the Louisiana Capital Representation Plan (the District Capital Representation Plan).

3. The state public defender may publish a form for the District Capital Representation Plan.

B. Capital Representation Plans to Provide for Compliance with the Guidelines

1. The Louisiana Capital Representation Plan and the District Capital Representation Plans shall set forth how each jurisdiction will conform to each of these guidelines and meet the standards established by the performance standards.

C. Capital Representation Plans to Provide for Zealous Advocacy

1. All elements of the Capital Representation Plan should be structured to ensure that counsel defending death penalty cases are able to do so free from political influence, judicial interference, conflicts of interest and under conditions that enable them to provide zealous advocacy in

accordance with the Louisiana Rules of Professional Conduct. The Capital Representation Plans should be structured to allow these goals to be achieved in a cost-effective and fiscally responsible manner.

2. While ensuring that the performance of the defense function is free from judicial interference, defense counsel should:

a. maintain adherence to the Rules of Professional Conduct;

b. manifest a professional attitude toward the judge, opposing counsel, witnesses, jurors, and others in the courtroom; and

c. should not knowingly disobey an obligation under the rules or rulings of a court, except for an open refusal based on an assertion that no valid obligation exists.

D. Capital Representation Plans to Provide for Case Supervisor in Every Case

1. The Capital Representation Plan shall provide that for each capital case a case supervisor will be specifically identified. Each case supervisor must be certified as lead counsel under these guidelines.

2. Where lead counsel in the case is an employee of a public defender office or defender organization, the supervisor will be the director of that office or organization, or a person he or she assigns to that role.

3. Where lead counsel in the case is acting under contract, the supervisor will be the director of the contracting agency, or a person he or she assigns to that role.

4. Where the director of an office, organization or contracting agency is counsel in the case, the supervisor shall be the trial level compliance officer or a person assigned by the trial level compliance officer.

5. The case supervisor is not counsel in the case but is responsible for assisting and supporting each attorney to provide representation in compliance with these guidelines. The case supervisor must monitor the representation in the case for compliance with these guidelines and associated performance standards.

6. The case supervisor may make recommendations to the defense team, resolve workload questions pursuant to §919 and report non-compliance with the guidelines to the district public defender and state public defender. The case supervisor does not have the authority to act on behalf of the defendant or to direct members of the defense team to take any action or refrain from taking any action.

E. Transitional provisions for capital representation plan

1. Each district public defender and the state public defender is to complete and submit to the board a capital representation plan within three months of the adoption of these guidelines by the board. The state public defender is to provide technical assistance to district public defenders to assist in completing their capital representation plans.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§905. Designation of Responsible Agencies

A. Responsibility for Ensuring High Quality Legal Representation in Capital Cases

1. Subject to R.S. 15:165, the district public defender is responsible within his or her jurisdiction for:

a. ensuring that each capital defendant in the jurisdiction receives high quality legal representation

consistent with these guidelines and associated performance standards at trial level;

b. ensuring the continuing cooperation of trial counsel and defense team members with appellate and post-conviction counsel;

c. recruitment and development of attorneys to represent capital defendants at trial level, including assisting attorneys in meeting certification requirements;

d. assigning the attorneys who will represent the defendant throughout the trial level of the case, except to the extent that the defendant has private attorneys and has not sought assistance as a partially indigent defendant;

e. monitoring the performance of all attorneys providing trial level capital representation in the jurisdiction;

f. periodically reviewing the roster of qualified attorneys in his or her jurisdiction and recommending to the state public defender the withdrawal of certification from any attorney who fails to provide high quality legal representation consistent with these guidelines; and

g. investigating and maintaining records concerning complaints about the performance of attorneys providing representation in death penalty cases within his or her jurisdiction and taking appropriate corrective action without delay.

2. The district public defender may assign these responsibilities to the state public defender by agreement with the state public defender and upon execution of an appropriate District Capital Representation Plan. Where a service region is established, the responsibilities vested in the district public defender in these guidelines may be assigned to the regional director as a part of a service delivery method for the region established under R.S. 15:160(B)(7).

3. The state public defender is responsible for:

a. ensuring that each capital defendant in the jurisdiction receives high quality legal representation consistent with these guidelines and associated performance standards at post-sentencing, appellate level and upon any remand;

b. ensuring that each capital defendant in the jurisdiction receives high quality legal representation consistent with these guidelines and associated performance standards at state post-conviction level;

c. ensuring that each capital defendant in the jurisdiction receives high quality legal representation consistent with these guidelines and associated performance standards at clemency level;

d. ensuring that each capital defendant in the jurisdiction receives high quality legal representation consistent with these guidelines and associated performance standards at trial level where defense services are provided by a capital defense organization acting pursuant to a contract with the board;

e. ensuring that each capital defendant in the jurisdiction receives high quality legal representation consistent with these guidelines and associated performance standards at trial level where responsibility is assigned to the state public defender by agreement with the district public defender or where such responsibility is assigned pursuant to R.S. 15:165;

f. investigating and maintaining records concerning complaints about the performance of attorneys providing

representation in cases for which he or she has responsibility under §905.A and take appropriate corrective action without delay; and

g. performing or ensuring the performance of all the duties listed in Subsection E.

B. Independence from the Judiciary

1. The district public defender, regional director and state public defender are to be independent of the judiciary and they, not the judiciary or elected officials, shall select lawyers for specific cases.

C. Delegation of Responsibility for Ensuring High Quality Legal Representation in Capital Cases

1. If the district public defender, regional director or state public defender assigns, contracts or delegates performance of its responsibilities under this Section, it shall clearly identify within the Capital Representation Plan to whom responsibility is assigned, contracted or delegated.

2. Performance of responsibilities under this Section may only be assigned, contracted or delegated to:

a. the state public defender;

b. a defender organization, that is:

i. a jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar or both to provide representation in death penalty cases. This may include a regional death penalty center as described in R.S. 15:164;

ii. a jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar or both to provide representation in death penalty cases; or

iii. an independent authority, that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

3. Regardless of any contract, assignment or delegation (save for an assignment of responsibility to the state public defender or the regional director) the district public defender, regional director or state public defender remain ultimately responsible for ensuring that the responsibilities described under this Section are met.

D. Conflict of Interest

1. In any circumstance in which the performance of a duty under this Section would result in a conflict of interest, the relevant duty should be performed by the state public defender, a defender organization or independent authority free of a conflict of interest and identified for this purpose in the Capital Representation Plan.

2. The Capital Representation Plan shall identify an effectual system to identify and resolve such conflicts. The system will include provisions to ensure that no organization or person responsible for representing a capital defendant shall be responsible for assigning or supervising counsel for another defendant with an antagonistic defense.

3. In order to ensure that the state public defender's office remains free of conflicts in all cases, no attorney who holds a formal role in the office of the state public defender shall represent a capital defendant in the jurisdiction during the term of his or her service.

E. Duties of State Public Defender

1. The state public defender should, in accordance with these guidelines, perform the following duties:

a. recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;

b. draft and periodically update rosters of certified attorneys;

c. periodically publish the certification standards, the procedures by which attorneys are certified and how attorneys are assigned to particular cases in each district;

d. assign the attorneys who will represent the defendant at each stage of every case where the state public defender has responsibility for ensuring that the capital defendant receives high quality legal representation under §905.A;

e. monitor the performance of all attorneys and defender organizations providing representation in capital proceedings;

f. periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with these guidelines;

g. conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases;

h. recruit and support the professional development of mitigation specialists in the state of Louisiana; and

i. ensure that each district public defender and regional director complies with his or her responsibilities under these guidelines and associated performance standards.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§907. Case tracking of Capital Cases

A. Obligation of District Public Defender to Track All Capital Cases within Jurisdiction

1. Each district public defender should track the arrest, indictment, procedural posture and disposition in all capital cases in his or her district up to and including sentencing stage. Tracking should include the cases of those defendants who are not currently indigent. Information gathered from the tracking of capital cases is to be promptly provided to the state public defender.

2. The district public defender's obligations under this Section remain even where the district has assigned responsibility for capital representation to the state public defender.

B. Obligation of State Public Defender to Track Capital Cases Post-sentencing

1. The state public defender should track the appeal, state post-conviction, federal post-conviction and clemency proceedings of every capital case in the jurisdiction.

C. Obligation of State Public Defender to Maintain Statewide Caseload Data

1. The state public defender should maintain and make available to the Board data describing the statewide capital caseload at each stage of a capital case.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§909. Eligibility for Public Defender Services

A. Eligible for Services if Financially Unable to Secure Appropriate Representation

1. A person will be eligible for public defender services if he or she is unable, without substantial financial

hardship to himself or to his dependents, to obtain competent, qualified legal representation on his own.

2. Substantial financial hardship is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, resides in public housing, or earns less than two hundred percent of the federal poverty guideline. A defendant is presumed to have a substantial financial hardship if he or she is currently serving a sentence in a correctional institution or is housed in a mental health facility.

3. Capital defendants not falling below the presumptive threshold will be eligible to receive public defender services if their particular circumstances, including seriousness of the charges being faced, monthly expenses, local private counsel rates for counsel qualified to handle capital cases, would result in a "substantial hardship" were they to seek to retain private counsel. Relevant considerations may include such factors as income or funds from employment or any other source, including public assistance, to which the accused is entitled, property owned by the accused or in which he or she has an economic interest, outstanding obligations, the number and ages of dependents, employment and job training history, and level of education. Release on bail alone shall not disqualify a person from eligibility.

4. A capital defendant meeting the above criteria will be eligible for public defender services notwithstanding that he or she has retained counsel through a collateral funding source or on a pro bono basis. A capital defendant who has retained counsel at his own expense may be eligible for public defender services subject to careful examination of his or her financial status and the possibility of seeking an order under R.S. 15:176.

B. Determination of Eligibility

1. The district public defender shall be responsible for determining eligibility for public defender services in each case in his or her jurisdiction. Should the district public defender be prevented from making such a determination by a conflict of interest, responsibility for the determination of eligibility will transfer to the state public defender.

2. The determination of eligibility shall not be subject to judicial or political interference.

3. A determination of eligibility in capital cases should be made as soon as possible after arrest or after the issue of eligibility has been raised.

4. Once a capital defendant is determined to be eligible for public defender services he or she shall be presumed to remain eligible through each stage of the capital case unless a formal determination of ineligibility is made.

5. Where, as a result of a change of circumstances or new information, the district public defender or state public defender believes that a defendant may not be eligible, the question of eligibility shall be investigated and a new determination made.

6. A capital defendant may be found to be eligible for public defender services notwithstanding a judicial finding that the defendant is not indigent pursuant to R.S. 15:175.

C. Eligibility in Capital Cases Presumed until Investigation of Eligibility Complete

1. All capital defendants are presumed eligible for public defender services until the completion of any

investigation of eligibility and a formal determination of ineligibility.

D. Finding of Ineligibility

1. Where a capital defendant is found to be ineligible for public defender services under this Section, the defendant may apply to the court for a determination of indigency under R.S. 15:175. If found by the court to be indigent, the defendant shall be deemed to be eligible for the purposes of this Section.

2. No capital defendant shall be found ineligible where he or she is able to provide some but not all of the funds necessary for an adequate defense. Instead, the defendant should be found eligible and an application for partial reimbursement pursued under R.S. 15:176.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§911. Assignment of Counsel

A. Assignment of Specific Attorneys to Each Capital Case

1. In each capital case the person or organization responsible for assigning counsel pursuant to §905 shall assign specific attorneys to each case and not an office, organization or group of attorneys. At least one appropriately certified attorney shall be assigned as lead counsel and at least one appropriately certified attorney shall be assigned as associate counsel. Additional counsel may be assigned when necessary or appropriate and assignments may be changed, subject to maintaining continuing compliance with these guidelines.

B. Assignment to be Consistent with Requirements of Guidelines

1. An attorney may only be assigned if he or she is currently certified in the appropriate role, is conflict free, meets the workload requirements of these guidelines and can be compensated in accordance with these guidelines. Assignments of attorneys must be made so as to meet the requirements of these guidelines, including §913.

C. Assignment of Counsel to Eligible Defendant Desiring Public Defender Services

1. Counsel shall be assigned to each defendant who is eligible to receive public defender services at the earliest possible opportunity following arrest and, wherever possible, prior to appearance under C. Cr. P. art. 230.1. Counsel shall be assigned no later than 48 hours after the time for appearance under C. Cr. P. art. 230.1.

2. Where an eligible capital defendant is arrested outside of Louisiana, the district public defender in the district in which the offense is alleged to have occurred will immediately assign counsel.

3. Counsel may be assigned prior to arrest where the capital defendant is an existing client of a public defender service or where the defendant seeks assistance in surrendering him or herself to police.

4. Counsel shall not be assigned to a defendant who indicates that he does not wish to receive public defender services. With the consent of the defendant, public defender services may be provided while a defendant considers whether he or she desires to receive public defender services.

D. Assignment of Counsel prior to Formal Finding of Eligibility

1. Where counsel is assigned prior to a formal finding of eligibility it is counsel's responsibility to immediately confer with the defendant to confirm his or her desire to receive public defender services unless this has already occurred.

E. Assignment of Counsel in Conflict Cases

1. Assignments in cases where there exists a conflict of interest will occur in accordance with the Capital Representation Plan and §905. Any person or organization unable to perform the assignment function due to a conflict of interest must immediately act to ensure that the appropriate non-conflicted authority may make the assignment.

F. Assignment of Counsel in Overflow Cases

1. Assignments in cases where the responsible person or organization is unable to assign counsel due to a lack of appropriately qualified and available counsel will occur in accordance with the Capital Representation Plan. Any person or organization unable to make an assignment due to a lack of available counsel must immediately act under the Capital Representation Plan to ensure that the appropriate authority may make the assignment.

G. Self-representation and Assignment of Standby Counsel

1. Where a capital defendant seeks to proceed without counsel, counsel is obliged to continue to represent the client in accordance with these guidelines and the performance standards until the motion for self-representation is granted. This obligation will include: investigating the competency of the client; the capacity of the client to knowingly, voluntarily and intelligently waive the right to the assistance of counsel; and the capacity of the client to engage in self-representation. Where appropriate, counsel should oppose the defendant's motion. Where appropriate, counsel should seek review of a trial court decision granting a capital defendant's motion for self-representation.

2. Where a capital defendant is proceeding pro se and the court permits or requires standby counsel, attorneys shall be assigned under these guidelines. Where attorneys are assigned to act as standby counsel a defense team shall be assembled consistent with §913 and be prepared to assume representation of the defendant should the court so order. Standby counsel has an ongoing obligation to monitor the capital defendant's competency, the quality of his waiver and his ability to represent himself and to bring such matters to the attention of the court where appropriate.

H. Unavailability of Counsel for Assignment

1. Where the persons or organizations identified in the capital representation plan responsible for assignment of counsel are unable to assign counsel, the district public defender and the state public defender shall be immediately notified. Where the district public defender and the state public defender are also unable to assign counsel, the state public defender shall immediately cause to be filed with the relevant court a notice that counsel cannot be assigned at this time.

2. In such cases, the state public defender shall assign capably certified counsel for the limited purpose of protecting the capital defendant's rights, including pursuing a halt of the prosecution.

3. Where counsel cannot be assigned to a case under this Section, the state public defender and district public

defender shall have an ongoing responsibility to identify counsel suitable for assignment to the case.

I. Transitional Provisions for Assignments Made Prior to Adoption of Guidelines

1. The district public defender or state public defender, as appropriate, shall review all assignments of attorneys in open capital cases made within his or her jurisdiction prior to the adoption of these guidelines by the board. Within six months of the adoption of these guidelines the district public defender or state public defender, as appropriate, shall take such action as is necessary to ensure that the assignment of attorneys in each such case has been brought into compliance with these guidelines.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§913. The Defense Team and Supporting Services

A. Minimum Components of the Defense Team

1. For all capital defendants, a defense team that will provide high quality legal representation must be assembled.

a. The defense team should consist of no fewer than two attorneys certified in accordance with §915 of these guidelines (with at least one qualified as lead counsel), an investigator, and a mitigation specialist;

b. The defense team must include individuals possessing the training and ability to obtain, understand and analyze all documentary and anecdotal information relevant to the client's life history;

c. At least one member of the team must have specialized training in identifying, documenting and interpreting symptoms of mental and behavioral impairment, including cognitive deficits, mental illness, developmental disability, neurological deficits; long-term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior; effects of substance abuse and the presence, severity and consequences of exposure to trauma;

d. The two attorneys, investigator and mitigation specialist described above are the minimum components of any defense team. The emphasis in assembling a defense team is to ensure that the team possesses the skills, experience and capacity to provide high quality representation in the particular case.

e. Additional team members will be appropriate in many cases in order to:

i. reflect the seriousness, complexity or amount of work in a particular case;

ii. meet legal or factual issues involving specialist knowledge or experience;

iii. ensure that the team has the necessary skills, experience and capacity available to provide high quality representation in the particular case;

iv. provide for the professional development of defense personnel through training and case experience; and

v. for any other reason arising in the circumstances of a particular case.

B. Expert, Investigative and Other Ancillary Professional Services

1. Counsel shall have access to the assistance of all expert, investigative, and other ancillary professional

services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings.

2. The state public defender shall provide funds for the assistance of experts, including mitigation specialists, and extraordinary investigative services. Such services will be provided by persons independent of the government and confidentiality of communications with the persons providing such services is to be maintained throughout the funding process. Funds for ordinary investigative services will be provided by the district public defender unless responsibility for the case under §905 is vested in the state public defender.

C. Defendants with Retained or Pro Bono Counsel

1. A capital defendant who is eligible for public defender services under §909 is entitled to public funds for the minimum components of a defense team and expert, investigative and other ancillary services notwithstanding that he or she has retained or pro bono counsel.

2. In such a case the district public defender, regional director or state public defender, as appropriate, shall be responsible for supplementing existing services available to the defendant to meet the requirements of this Section.

3. In such a case, the district public defender, regional director or state public defender, as appropriate, shall be responsible for ensuring that the capital defendant receives high quality legal representation in his or her capital case. In the absence of specific agreement with the district public defender, regional director or state public defender, counsel assigned to the case shall operate as lead counsel.

4. If a retained attorney becomes unable to continue representing a capital defendant because the defendant or any third party cannot fulfill the terms of the financial agreement between the attorney and the defendant or any third party, that attorney is not eligible to be appointed to represent the defendant.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§915. Qualifications of Defense Counsel

A. Certification Standards Intended to Ensure High Quality Legal Representation

1. The certification standards and mechanisms established by these guidelines should be construed and applied in such a way as to further the overriding goal of providing each client with high quality legal representation.

B. Goals of Certification Standards

1. In formulating certification standards, the Public Defender Board seeks to insure:

- a. that every attorney representing a capital defendant has:
 - i. obtained a license or permission to practice in the state of Louisiana;
 - ii. the skills, experience and capacity available to provide high quality capital defense representation;
 - iii. demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
 - iv. satisfied the training requirements set forth in §923;

b. that the pool of defense attorneys as a whole is such that each capital defendant in Louisiana receives high quality legal representation. Accordingly, the certification standards are meant to insure that the pool includes sufficient numbers of attorneys who have demonstrated:

- i. substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
- ii. skill in the management and conduct of complex negotiations and litigation;
- iii. skill in legal research, analysis, and the drafting of litigation documents;
- iv. skill in oral advocacy;
- v. skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- vi. skill in the investigation, preparation, and presentation of evidence bearing upon mental status, including mental retardation;
- vii. skill in the investigation, preparation, and presentation of mitigating evidence;
- viii. skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements; and
- ix. skill in maintaining a strong working relationship with a capital defendant.

C. Standard Process for Certification

1. Certification is available for the roles of Trial Lead Counsel, Trial Associate Counsel, Appellate Lead Counsel, Appellate Associate Counsel, Post-Conviction Lead Counsel, or Post-Conviction Associate Counsel.

2. Attorneys seeking certification must submit a detailed application to the state public defender with the overall purpose of establishing their experience and knowledge in each of the categories in §915.B.1.b, as well as the minimum requirements for the particular role for which they seek certification as outlined in §915.D, and have satisfied the training requirements outlined in §923.

3. The information in an application for certification shall include:

- a. to the extent possible, a list of all capital cases in which the attorney has served as defense counsel, including the name of the defendant, judicial district court, trial judge, prosecuting attorneys, co-counsel, the result or verdict and any reported appellate decisions in the case;
- b. any other experiences the attorney believes will establish his or her qualifications, including but not limited to:
 - i. non-capital trial or appellate experience;
 - ii. experience as a public defender or prosecutor, or as an attorney in a capital defense organization;
 - iii. observation of complete capital trials; and/or
 - iv. extensive research and/or training in the field of capital defense;
- c. at least two samples of substantial written legal work product including analysis of complex legal issues, preferably filed in a capital case, prepared by the attorney at the trial, appellate or post-conviction level;
- d. the names and phone numbers of two district court judges (or appellate judges in the case of appellate

certification) or capital defense attorneys familiar with the attorney's work as an advocate;

e. written statement by the applicant describing the extent and source of relevant proficiencies in each of the categories in §915.B.1.b;

f. an authorization to permit the state public defender to obtain CLE records for the attorney both prior to and during any period of certification;

g. a signed undertaking that the attorney will comply with the continuing obligations of certified counsel detailed in §915.I;

h. a listing of the number of active trial, appellate or post-conviction cases the attorney has, and any non-active cases that may become active in the next year;

i. any other relevant background or specializations which might inform the state public defender of the attorney's qualifications for certification or the assignment of particular cases;

j. proof that the attorney is licensed to practice in Louisiana or has been granted permission to practice in a capital case or cases in Louisiana;

k. information relevant to assessing the applicant's professional, physical and mental fitness for certification, including:

i. any findings of professional misconduct in this or any other jurisdiction, including any findings of contempt of court;

ii. any matter affecting the applicant's physical health that would substantially impair the applicant's capacity to meet the requirements of certified capital counsel in these guidelines and associated performance standards; and/or

iii. any matter affecting the applicant's mental health that would substantially impair the applicant's capacity to meet the requirements of certified capital counsel in these guidelines and associated performance standards.

4. The state public defender may develop and publish an application form. Where an applicant is unable to supply one or more of the items required above, the application should provide an explanation for this and the state public defender may waive the requirement or require other material to be supplied in lieu of that listed in this Section.

D. Minimum Experience Requirements for Certification

1. The following minimum required experience levels apply for each of the roles for which certification is available:

a. Qualified Trial Lead Counsel shall:

i. have at least five years of criminal trial litigation experience;

ii. have prior experience as lead counsel in no fewer than nine jury trials tried to completion; of these, at least five must have involved felonies or two must have involved the charge of murder; and

iii. have prior experience as lead counsel or associate counsel in at least one case in which the death penalty was sought and was tried through the penalty phase or have prior experience as lead counsel or associate counsel in at least two cases in which the death penalty was sought and where, although resolved prior to trial or at the guilt phase, a thorough investigation was performed for a potential penalty phase.

b. Qualified Trial Associate Counsel shall:

i. have at least three years of criminal trial experience; and

ii. have prior experience as lead counsel in no fewer than three felony jury trials which were tried to completion, including service as lead or associate counsel in at least one homicide trial.

c. Qualified Appellate Lead Counsel shall:

i. have at least five years of criminal appellate litigation experience;

ii. have prior experience within the last three years as lead counsel in the appeal of no fewer than three felony convictions in federal or state court; and

iii. have prior experience within the last three years as lead counsel or associate counsel in the appeal or post-conviction application, in federal or state court, of at least one case where a sentence of death was imposed; and

iv. be familiar with the practice and procedure of the Louisiana Supreme Court in the appeal of capital cases; the practice and procedure of the United States Supreme Court in the application for writs of certiorari in capital cases; and the law controlling the scope of and entitlement to state post conviction and federal habeas corpus review.

d. Qualified Appellate Associate Counsel shall:

i. have demonstrated adequate proficiency in appellate advocacy in the field of felony defense; and either have at least:

(a) three years of criminal trial or appellate litigation experience; or

(b) two years experience as a full time attorney at a capital defense organization in Louisiana.

e. Qualified Post-Conviction Lead Counsel shall:

i. have at least five years of criminal post-conviction litigation experience; and

ii. have demonstrated clear competence and diligence in representation provided as:

(a) counsel of record for defendant in at least five felony post-conviction relief/habeas corpus proceedings (including at least one murder conviction); and

(b) counsel of record for defendant as lead or associate counsel in two death penalty related post-conviction/habeas corpus proceedings in which petition has been filed; and

iii. have been lead counsel in a capital post-conviction proceeding which had an evidentiary hearing or been lead counsel in at least two felony post-conviction evidentiary hearings or trials; and

iv. be familiar with the substantive law and the practice and procedure of the courts of Louisiana in the review of capital post-conviction applications; and

v. be familiar with federal habeas corpus statutory law, practice and procedure, particularly including federal review of state convictions in capital cases.

f. Qualified Post-Conviction Associate Counsel shall:

i. have demonstrated adequate proficiency in post-conviction/habeas advocacy in the field of felony defense and either:

(a) have at least three years of criminal trial, appellate or post-conviction/habeas litigation experience; or

(b) have at least two years experience as a full time attorney at a capital defense organization in Louisiana.

g. Waiver of Experience Qualification Due to Equivalent Alternative Experience

i. Having appropriate regard to the goals of these certification standards, the state public defender may waive formal compliance with the minimum experience requirements contained in this Section where satisfied that the applicant has equivalent alternative experience. However, in all cases lead counsel must have been admitted to the bar for at least five years.

E. Minimum Training Requirements for Certification

1. Prior to certification, the applicant must have satisfactorily completed within the preceding two years a comprehensive training program as described in §923.B. This requirement is non-waivable, though counsel not meeting this requirement will be eligible for provisional certification.

F. Consideration of Certification Applications

1. Subject to §915.H, the decision to certify or not certify an applicant under §915 rests in the sole discretion of the state public defender and shall not be subject to political or judicial interference.

2. The state public defender shall promptly review each application, investigate the contents of the submission, make any further enquiries that will assist in deciding whether certification is appropriate, and determine whether the attorney should be certified as Trial Lead Counsel, Trial Associate Counsel, Appellate Lead Counsel, Appellate Associate Counsel, Post-Conviction Lead Counsel, Post-Conviction Associate Counsel or provisionally certified under §915.G.

3. The state public defender may request that the applicant submit any further information required to allow a full consideration of the application.

4. The state public defender shall not certify any applicant unless he or she:

- a. is licensed or has been granted permission to practice in Louisiana;
- b. meets the requirements of §915.D and E; and
- c. has submitted an application complying with §915.C, including an undertaking to comply with the requirements of §915.I.

5. In determining whether certification is appropriate, the state public defender shall have regard to:

- a. the goals of certification;
- b. the experience of the applicant;
- c. the prior training of the applicant;
- d. the proficiency of the applicant in the provision of capital defense services; and
- e. the extent to which the applicant has the commitment, skill and capacity to provide zealous advocacy and high quality legal representation in the defense of capital cases.

6. If the applicant is not certified, or not certified for the role requested, the state public defender shall inform him or her of the reasons for the denial of certification in writing. The applicant shall be given the opportunity to supplement the initial application or, where appropriate, to submit a further application upon meeting any deficiency.

G. Provisional Certification

1. An attorney whom the state public defender has found to be not appropriate or eligible for certification in a particular role may be granted provisional certification in

that role subject to such conditions as may be set by the state public defender.

2. Conditions attached to provisional certification may include but are not limited to:

- a. undertaking and satisfactorily completing further training as determined by the state public defender;
- b. working with resource counsel assigned by the state public defender;
- c. working only on a specific case or cases;
- d. working only with a specific attorney or attorneys as determined by the state public defender;
- e. limiting responsibility in work on a case to a particular area or areas as determined by the state public defender;
- f. working only as a part of a defense team that includes a member or members with a particular skill, experience or expertise as determined by the state public defender;
- g. achieving or maintaining a caseload or workload of a level and type determined by the state public defender.

3. A provisionally certified attorney shall be regarded as being certified for the purposes of §913 and Rule XXXI, La. S. Ct. Rules, but may not be assigned to any case without the prior approval of the state public defender and under circumstances that ensure that the conditions set for provisional certification are met and will continue to be met.

H. Appeal from Denial of Certification

1. After being notified of the final decision of the state public defender, an attorney who has been denied certification can make a written request within 21 calendar days of the notification to appeal the decision to the board or an appeals review committee designated by the board. The decision of the board or appeals review committee shall not be subject to judicial or political interference.

I. Obligations of Certified Counsel

1. It will be a continuing obligation of certified counsel to:

- a. comply with these guidelines and associated performance standards;
- b. comply with the Louisiana Rules of Professional Conduct;
- c. maintain caseloads and workloads within the limits established by the guidelines established by the Louisiana Public Defender Board, except as specifically authorized by the state public defender;
- d. cooperate with case monitoring and case reviews by the case supervisor, district public defender and state public defender;
- e. attend and successfully complete continuing capital legal education as described in §923.C;
- f. notify the state public defender of any change of address or contact information;
- g. immediately notify the state public defender of any change in his or her licensure or permission to practice in the state of Louisiana;
- h. immediately notify the state public defender of any change in the information contained in his or her application for certification relating to professional, physical, mental fitness to be certified as capital counsel;
- i. promptly respond to any request for information from the state public defender, regional director or district public defender, as appropriate, relevant to the attorney's

performance as capably certified counsel or satisfaction of the obligations of capably certified counsel; and

j. notify every court in which he or she is counsel in a capital case of any reduction in the level or extent of his certification.

J. Maintaining Certification

1. Certified attorneys must apply to the state public defender for re-certification by January 31 of each calendar year following the year of initial certification under these guidelines.

2. When applying for re-certification, counsel must certify continued compliance with the obligations established under the guidelines, including the requirement for continuing capital legal education. The attorney must advise the state public defender of any previously undisclosed failure to comply with these guidelines.

3. The state public defender shall publish an application form for re-certification. The state public defender shall distribute re-certification application forms to all certified counsel each year.

4. Following submission of an application for certification, an attorney will remain certified until such time as the state public defender determines to re-certify or not re-certify the attorney.

5. The state public defender will promptly consider each application for re-certification and determine whether to re-certify the attorney. Consideration of re-certification and any appeal from the decision will be handled in a manner consistent with §915.F, G and H. An attorney will remain provisionally certified during any appeal from a refusal to re-certify the attorney.

6. Where an attorney fails to timely apply for re-certification, he or she shall be reduced to provisional certification status. The state public defender shall investigate the failure to apply for re-certification and either de-certify the attorney or consider an out of time application for certification.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§917. Certification Transitional Provision

A. Re-certification for Attorneys on the Roster Prior to the Promulgation of these Guidelines

1. All attorneys on the Public Defender Board's Capital Certification Roster at the time of the adoption of these guidelines shall be deemed to be certified under these guidelines on the date of adoption subject to the following.

a. All attorneys deemed to be certified under this Section must apply for certification under these guidelines within six months of the guidelines being adopted by the board or be de-certified. An attorney de-certified in this way may subsequently apply for certification.

b. Attorneys deemed to be certified under these guidelines must satisfy the comprehensive training program requirement contained in §923.B within two years of the adoption of these guidelines. Where an attorney fails to satisfy this provision he or she shall be immediately reduced to provisional certification status and the state public defender shall determine whether the attorney should be de-certified.

c. The state public defender will inform any court in which the attorney is acting for a capital defendant of the de-certification of the attorney.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§919. Workload

A. Workloads Should be Low Enough to Allow High Quality Legal Representation

1. Workloads of defense team members shall be maintained at a level that enables counsel to provide each client with high quality legal representation in accordance with these guidelines and associated performance standards, including the ability of counsel to devote full time effort to the case as circumstances will require.

B. Caseloads and Workloads

1. Attorneys shall maintain workloads in compliance with any policy or rule adopted by the board under R.S. 15:148(B)(1)(a).

2. Pending the adoption by the board of a policy or rule under R.S. 15:148(B)(1)(a), attorneys shall maintain caseloads in compliance with Chapter 12, Louisiana Standards on Indigent Defense.

C. Responsibility for Maintaining Appropriate Workload Levels

1. The state public defender, regional director and district public defender shall be responsible for ensuring that the attorneys in each case for which they have responsibility under §905 are in compliance with this Section and shall assist the attorneys to achieve and maintain appropriate workloads.

2. Each supervisor of a capital attorney has a responsibility to ensure that the attorneys he or she supervises maintain compliance with this Section and assist the attorneys to achieve and maintain appropriate workloads.

3. Each attorney has an individual responsibility to ensure that he or she maintains compliance with this Section.

D. Obligation to Refuse New Cases in Excess of Workload Limits

1. An attorney should not be assigned new case assignments that will result in his or her workload exceeding that allowed by §919.A after accepting a capital case.

2. Where an attorney believes that accepting a new case will result in a workload in violation of §919.A, the attorney must bring this to the attention of the case supervisor for reasonable resolution of the question of professional duty created. Where the question of whether the workload is excessive is reasonably arguable, the responsibility to ensure compliance with these guidelines rests with the case supervisor. Where the workload is excessive, this may include but is not limited to ensuring that no new assignment is made; reallocating other responsibilities; and providing additional personnel on new or existing cases.

3. Where the attorney believes that the resolution of the question has been inadequate he or she must raise the question progressively with the district public defender, regional director and state public defender, as appropriate, for reasonable resolution.

4. Where the question of whether the workload is excessive is not reasonably arguable or where the attorney has exhausted all available avenues for a reasonable resolution of the question and no reasonable resolution has been provided, the attorney should decline to accept any new cases.

5. An attorney should decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in his or her workload exceeding that allowed by §919.A.

E. Obligation to Respond to Excessive Workloads

1. Where an attorney believes that his or her workload is in violation of §919.A, the attorney must bring this to the attention of the case supervisor for reasonable resolution of the question of professional duty created. Where the question of whether the workload is excessive is reasonably arguable, the responsibility to ensure compliance with these guidelines rests with the case supervisor.

2. Where a case supervisor becomes aware that an attorney's workload may exceed that allowed by §919.A, he or she shall immediately investigate the attorney's workload and take appropriate steps to bring the attorney's workload into compliance with this Section. Such action may include:

a. assigning additional members to the defense team on particular cases to reduce the workload demands on the attorney;

b. assisting the attorney in moving to withdraw from a particular case or cases;

c. counseling the attorney to withdraw from a case or cases that are not the subject of supervision;

d. assisting the attorney in managing non-representational responsibilities by reassigning those responsibilities or providing additional support for the attorney in meeting those responsibilities.

3. Where the attorney believes that the resolution of the question of excessive workload has been inadequate, he or she must raise the question progressively with the district public defender, regional director and state public defender, as appropriate, for reasonable resolution.

4. Where the question of whether the workload is excessive is not reasonably arguable and where the attorney has exhausted all available avenues for a reasonable resolution of the question and no reasonable resolution has been provided, the attorney should move to withdraw from the case or cases in which capital defense services in compliance with these guidelines and associated performance standards cannot be provided. The state public defender must be provided reasonable notice prior to the filing of any motion to withdraw under this Section.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§921. Monitoring of Certified Counsel; Removal

A. Monitoring Performance of Defense Counsel

1. The state public defender is responsible for monitoring the performance of all capital defense counsel to ensure that each client is receiving high quality legal representation.

2. The district public defender is responsible for monitoring the performance of all capital defense counsel in his or her jurisdiction, when not precluded from doing so by a conflict of interest.

3. Where there is evidence that an attorney is not providing high quality legal representation consistent with these guidelines and associated performance standards, the state public defender and district public defender, as appropriate, should take necessary action to protect the interests of the attorney's current and potential clients.

B. Complaints Procedure

1. The state public defender shall establish and publicize a complaints procedure.

C. Capital Case Review

1. Whenever a capital case has been closed at trial, appellate, state post-conviction, federal post-conviction or clemency level the state public defender shall receive a briefing from counsel regarding the course of the representation. The state public defender may publish a form for the provision of case briefings.

2. At the discretion of the state public defender and in every case in which a death sentence is imposed or affirmed, post-conviction relief is denied or a defendant is executed, a case review committee shall be convened by the state public defender to review the course of the representation. The purpose of the review is to gather information to assist in the ongoing provision of high quality representation in capital cases.

D. Periodic Review of Certification and Service Provision

1. The state public defender shall review the roster of attorneys certified on an annual basis to ensure that attorneys listed remain capable of providing high quality legal representation.

2. The state public defender shall review the service delivery of each district public defender and defender organization each year to ensure that each remains capable of providing high quality legal representation.

E. Decertification

1. The state public defender may decertify, reduce the role for which counsel is certified or reduce to provisional certification any attorney who has: failed, without good cause, to meet the requirements of these guidelines and associated performance standards; has failed, without good cause, to satisfy the obligations of certified counsel under §915.1; has become unsuitable for capital certification under §915; has failed to continue to demonstrate that he or she has the required legal knowledge and skill necessary for capital defense representation; or has failed to continue to demonstrate that he or she is willing to apply that knowledge and skill with appropriate thoroughness and preparation.

2. The state public defender may also remove an attorney from the roster if, as part of a periodic review of the roster, the state public defender determines that a smaller roster of attorneys will better serve the goals of ensuring the best possible representation of indigent capital defendants and of delivering quality services in the most efficient and cost-effective manner.

3. Where counsel is decertified the state public defender shall ensure that each court in which the attorney represents a capital defendant is advised of this fact. The responsible agency under §905 will assign new counsel to represent the defendant in order to ensure that the defendant receives representation in compliance with these guidelines and the associated performance standards. Counsel who are decertified shall not be paid for work performed after

decertification except for such work as is necessary to provide for an effective transition of case responsibility to successor counsel.

4. Where there is substantial evidence that an attorney has failed to provide high quality legal representation, the attorney shall be reduced by the state public defender to provisional certification and the state public defender shall promptly investigate the circumstances of the representation.

5. Following the investigation, the state public defender may restore the attorney's original level of certification, reduce the role for which the attorney is certified, confirm the provisional certification or decertify the attorney.

6. Where there is substantial evidence that a systemic defect in a defender organization has caused the office to fail to provide high quality legal representation, the state public defender and district public defender shall ensure that the organization does not receive additional assignments of cases. The state public defender shall promptly investigate the existence of a systemic defect.

7. Following the investigation the state public defender may direct that the defender organization continue to receive case assignments, require that remedial action be taken or take action to ensure that the defender organization does not receive any further assignments and that existing clients receive representation consistent with these guidelines and associated performance standards.

8. Any attorney or defender organization that may be the subject of an adverse decision under §921.E shall be provided written notice of any action being contemplated and an opportunity to respond in writing before any final action is taken.

9. Any attorney or defender organization adversely affected by a decision under §921.E may appeal that decision in the manner described in §915.H.

F. Protection of Zealous Advocacy

1. The state public defender must ensure that this Section is implemented consistently with §903, so that an attorney's zealous representation of a client cannot be cause for the imposition or threatened imposition of sanctions pursuant to this Section.

G. Inherent Regulatory Authority of Louisiana Supreme Court

1. Nothing in this Section is intended to derogate from the inherent regulatory authority of the Louisiana Supreme Court provided for in Article V, Section 5 of the Constitution of Louisiana regarding the regulation of the practice of law.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§923. Training

A. Funding of Capital Defense Trainings

1. Funds should be made available by the Public Defender Board for the effective training, professional development, and continuing education of capital defense attorneys, investigators and mitigation specialists.

B. Comprehensive Training Program

1. Attorneys seeking to qualify for capital defense certification shall satisfactorily complete a comprehensive training program, approved by the state public defender, in the defense of capital cases. Such a program should include,

but not be limited to, presentations and training in the following areas:

- a. relevant state, federal, and international law;
- b. pleading and motion practice;
- c. pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;
- d. jury selection;
- e. trial preparation and presentation, including the use of experts;
- f. the investigation, preparation, and presentation of mitigating evidence;
- g. investigation, preparation, and presentation of evidence bearing upon mental status, including mental retardation;
- h. ethical considerations particular to capital defense representation;
- i. preservation of the record and of issues for post-conviction review;
- j. counsel's relationship with the client and his family;
- k. post-conviction litigation in state and federal courts;
- l. the presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.

2. The state public defender shall develop and provide a comprehensive training program to assist attorneys in meeting the mandatory training requirements established by §923.B. The state public defender shall offer the comprehensive training program on at least an annual basis.

C. Continuing Capital Legal Education

1. Attorneys seeking to remain on the certification roster must continue to attend and successfully complete specialized training program approved by the state public defender that focuses on the defense of death penalty cases. Attorneys must complete at least eighteen hours of training at an approved course or courses every two years.

D. Continuing Professional Education—Non-attorneys

1. All non-attorneys wishing to be eligible to participate on defense teams should receive continuing professional education appropriate to their areas of expertise.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§925. Funding and Compensation

A. Responsibility for Funding Capital Defense

1. Except as otherwise provided in these guidelines, the district public defender shall be responsible for funding capital defense services in each case for which he or she has responsibility under §905. The state public defender shall be responsible for funding capital defense services as provided for in these guidelines and in each case for which he or she has responsibility under §905.

2. Where a district public defender or the state public defender has insufficient funds to provide for capital defense services for which it has responsibility, the Board shall have responsibility for making available sufficient funds to permit the funding of capital defense services consistent with these guidelines and associated performance standards.

3. Where the board is unable to provide sufficient funds to permit representation consistent with these

guidelines and associated performance standards it shall be the obligation of defense counsel in each case so affected to take all necessary steps to preserve and protect the defendant's rights until adequate funding is provided, including, in a trial level case, move for a halt of prosecution.

B. Allocation of Funds

1. Within the constraints of available funds, the board, the state public defender and each district public defender responsible for capital representation shall endeavor to make adequate budgetary allowance for the funding of capital defense services consistent with these guidelines and associated performance standards and in a cost-effective and fiscally responsible manner.

2. The board, the state public defender and each district public defender responsible for capital representation must balance the responsibility to fund capital representation with the obligation to fund representation in other cases and within the constraints provided by available funds, must endeavor to provide adequate funds for all required indigent defense services and make budget allocations accordingly.

3. Similarly, the board, the state public defender and each district public defender responsible for capital representation must balance the responsibility to fund capital representation across all of the districts in the state and at each stage of capital representation and must endeavor to provide adequate funds for all required capital defense services and make budget allocations accordingly.

4. Where the demand for capital defense services exceeds the available funds, the board, the state public defender and each district public defender shall ensure that funds are allocated consistent with the following principles:

a. funds allocated for and necessary for services other than capital defense services shall not be re-allocated to capital defense services, provided that the budget has reasonably sought to balance funding for the capital and non-capital funding responsibilities of the board, state public defender and district public defender;

b. funds allocated for different districts, regions or stages of representation in capital cases shall not be re-allocated to another district, region or stage of representation provided that the budget has reasonably sought to balance funding for all required capital defense services;

c. funds should be made available to capital cases only to the extent that each case can be funded at a level that can provide for representation consistent with these guidelines and associated performance standards. Capital cases should not be partially funded at a level below that necessary to achieve compliance with these guidelines and associated performance standards;

d. notwithstanding the above, where a capital case cannot be adequately funded, funds may be used for the limited purposes of:

i. preserving the rights of the defendant, including the right to a halt of prosecution; and

ii. minimizing any irremediable prejudice arising from the lack of adequate funds, for example, by preserving available evidence;

e. within each stage of representation (trial, appeal, post-conviction, clemency), funds are to be allocated and expended on cases in the order in which the obligation to provide representation began, or the order in which the need for particular funds has been presented; and

f. decisions regarding the allocation of funds are to be made free from political or judicial interference.

C. Compensation of Capital Defense Counsel

1. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation. Salary and other compensation should be comparable to other positions of similar stature throughout the state.

2. Flat fees, caps on compensation, and lump-sum contracts with attorneys are improper in death penalty cases.

3. No distinction between rates for services performed in or out of court should be maintained.

4. Periodic billing and payment should be available to capital defense counsel.

D. Compensation of Non-attorney Team Members

1. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases. Salary and other compensation should be comparable to other positions of similar stature throughout the state.

2. No distinction between rates for services performed in or out of court should be maintained.

3. Periodic billing and payment should be available to non-attorney team members and experts.

E. Roster of Presumptively Reasonable Compensation

1. The state defender shall draft and publish a roster of presumptively reasonable rates of compensation for defense counsel, investigators, mitigation specialists and experts across the state, making provision for different rates for different regions of the state where necessary.

F. Funding in Unusually Protracted or Extraordinary Cases

1. Additional compensation should be available in unusually protracted or extraordinary cases.

G. Reasonable Incidental Expenses

1. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

H. Documentation of Resource and Funding Allocation

1. It shall be the responsibility of counsel to request all resources and funds necessary to provide representation consistent with these guidelines and the performance standards. Counsel must ensure that all requests for and decisions regarding the allocation of resources and funds are clearly documented in the client file.

2. The board, the state public defender and each district public defender shall also ensure that all requests for and decisions regarding the allocation of resources and funds are clearly documented and preserved.

3. The requirement to clearly document decisions regarding resource and funding allocations operates even where counsel is also the person responsible for making the decision, for example, where the district public defender is lead counsel. Where counsel's obligation to the client creates a conflict with the obligation to make a decision regarding resource and funding allocations, the decision may be referred to the state public defender.

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

§927. Establishment of Performance Standards

A. Establishing Performance Standards

1. The Public Defender Board shall establish performance standards for all counsel in death penalty cases.

2. Pending the adoption of these performance standards, counsel in death penalty cases should meet the standards adopted by the American Bar Association.

B. Standards Shall Operate as a Benchmark for Performance and Qualifications

1. The standards of performance should be formulated and interpreted so as to insure that all counsel provide high quality legal representation in capital cases in accordance with these guidelines. The performance standards shall serve as a benchmark when assessing the performance of counsel.

C. Interim Performance Standards

1. Pending the formal adoption of capital performance standards by the board the following shall, with any necessary modification to reflect Louisiana nomenclature and prevailing legal obligations, be deemed to operate as relevant performance standards under these guidelines:

a. Guidelines 10.2-10.15.2 of the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*; and

b. State of Louisiana Performance Standards for Criminal Defense Representation in Indigent Criminal Cases in the Trial Court (adopted June 20, 2006).

AUTHORITY NOTE: Promulgated in accordance with R.S. 15:148.

HISTORICAL NOTE: Promulgated by the Office of the Governor, Public Defender Board, LR 36:

Family Impact Statement

In compliance with Act 1183 of the 1999 Regular Session of the Louisiana Legislature, the impact of this proposed Rule on the family has been considered. It is anticipated that this proposed Rule will have a positive impact on family functioning, stability, and autonomy as described in R.S. 49:972 by helping to ensure that indigent parents and/or their children accused of capital offenses will receive quality legal representation, thereby helping the family unit during a time of crisis.

Small Business Statement

The impact of the proposed Rule on small businesses as defined in the Regulatory Flexibility Act has been considered. It is estimated that the proposed action is not expected to have a significant adverse impact on small businesses. The agency, consistent with health, safety,

environmental and economic welfare factors has considered and, where possible, utilized regulatory methods in the drafting of the proposed Rule that will accomplish the objectives of applicable statutes while minimizing the adverse impact of the proposed Rule on small businesses.

Public Comments

Interested persons who wish to submit data, views, comments, or arguments may do so by writing to Jean M. Faria, State Public Defender, 500 Laurel Street, Suite 300, Baton Rouge, LA 70801. Such writings will be accepted through 2 p.m., Monday, February 22, 2010.

Jean M. Faria
State Public Defender

FISCAL AND ECONOMIC IMPACT STATEMENT FOR ADMINISTRATIVE RULES RULE TITLE: Capital Defense Guidelines

I. ESTIMATED IMPLEMENTATION COSTS (SAVINGS) TO STATE OR LOCAL GOVERNMENT UNITS (Summary)

There are no anticipated implementation costs or savings to the state or local government units, as the objective of the proposed rule is to increase the quality of representation without increasing costs or the Louisiana Public Defender Board's table of organization. Training will be provided at no cost to public defender attorneys; however, it is conceivable that District Public Defenders may incur some costs associated with travel (i.e., mileage, meals and lodging) if public defender attorneys working for them are required to travel to attend training.

II. ESTIMATED EFFECT ON REVENUE COLLECTIONS OF STATE OR LOCAL GOVERNMENTAL UNITS (Summary)

There will be no impact on state or local revenue collections.

III. ESTIMATED COSTS AND/OR ECONOMIC BENEFITS TO DIRECTLY AFFECTED PERSONS OR NONGOVERNMENTAL GROUPS (Summary)

This rule proposes to adopt provisions establishing mandatory guidelines and performance standards for the defense of capital cases. It is anticipated that implementation of this proposed rule will have minimal economic cost for public defender attorneys who desire to handle capital cases and meet additional training requirements; however, the cost is indeterminable since there is no way to determine how many public defender attorneys will obtain such certification and, further, that training will be provided at no cost to such public defender attorneys. However, in the event District Public Defenders do not pay travel costs for public defender attorneys who work for them, it is conceivable that the individual public defender attorneys may incur some travel costs if they are required to travel to attend training.

IV. ESTIMATED EFFECT ON COMPETITION AND EMPLOYMENT (Summary)

This proposed amended rule should not affect competition or employment.

Jean M. Faria
State Public Defender
0912#033

H. Gordon Monk
Legislative Fiscal Officer
Legislative Fiscal Office